

Ending the default retirement age

Last month the Government launched a consultation paper announcing its intention to end the national default retirement age from April 2011. This is the exemption from the Age Equality Regulations which allows employers to retire staff at the age of 65 onwards without facing discrimination claims. If the plans are adopted employers will not be able to rely on a compulsory retirement age unless it can be objectively justified. Transitional protection will be available for retirements notified prior to 1 April next year and which take effect before 1 October 2011.

Background

The default retirement age has been under challenge ever since the Age Equality Regulations came into force in October 2006. It was criticised for removing protection from older employees at the time they most needed it. Legal proceedings were launched by Heyday (now Age UK) arguing that the retirement exemption infringed the underlying EU Directive, the Employment Framework Directive. The proceedings led to a referral to the European Court of Justice, which issued a ruling favourable to the Government in March 2009.

The Heyday litigation ended with a High Court ruling last autumn. The judge upheld the retirement exemption on the grounds that it was justified when the regulations were first introduced in 2006. However he made it clear that his decision may have been different if the Government had not already announced a review of the exemption. That review was started by the outgoing Labour Government and the consultation document draws on research it commissioned. The proposals reflect the commitment made by the current Government in May 2010 to phase out the default retirement age.

The proposals in more detail

The main proposals in the consultation document can be summarised as follows:

- The default retirement age will be abolished with effect from April 2011, with transitional protection for retirements notified before April 2011, provided the date of retirement falls before 1 October 2011 and at least six months' notice has been given.
- The right to request procedures will be abolished. That means an end to the complex pre-notification requirements and the procedures which allow employees to request a meeting if they do not wish to retire.
- The Government is considering introducing a code of practice or guidance to facilitate retirement discussions between employers and employees.
- It will still be open to employers to justify a compulsory retirement age (though see below for the likely difficulties that employers will face). Although they will no longer be able to rely on retirement per se as a potentially fair reason for dismissal, enforcing a justified retirement age would be a potentially fair reason for dismissal as it would amount to "some other substantial reason" justifying dismissal.

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- The Government is considering legislating to clarify when it is permissible to stop benefits such as life cover for older employees, or pass on the additional cost. At present it is unclear whether employers can do this as a condition for allowing older workers to stay on beyond their normal retirement age.

The consultation period ends on 21 October 2010.

Justifying compulsory retirement

It will still be possible to retain a compulsory retirement age, but only if it can be objectively justified. How can this be done? Co-incidentally, this is just the question the Court of Appeal has addressed in a decision announced the day before the launch of the consultation document, when it rejected an appeal made by a former partner in a law firm challenging his forced retirement at the age of 65.

The retirement exemption does not cover partnerships, so this case could be seen as a trial run for employers who wish to retain a compulsory retirement age after the exemption is abolished. To do so they will need to be able to demonstrate that their chosen retirement age has been adopted as a “proportionate means of achieving a legitimate aim”. At first sight the signs are encouraging, because the partnership was able to rely on what was termed the “collegiality” principle, based on the idea (criticised in some quarters as being inherently discriminatory) that older workers should be able to retire with dignity without their performance being challenged. The partnership was also able to rely on succession planning as a legitimate aim.

However the decision is less helpful about what age to pick, because the employment tribunal has still to decide whether the means chosen by the partnership were a proportionate way of achieving the aims which the Court of Appeal has now pronounced legitimate. In other words, was 65 the right age at which to impose compulsory retirement? Without deciding the point, the Court of Appeal seems to be suggesting that a retirement age of 65 for partners might be acceptable because that was the age at which employees could be made to retire. Once the default retirement age goes that reference point will be lost.

There have been a number of other cases which might provide pointers, but so far no consistent picture has emerged. Here are some recent examples:

- Setting a maximum recruitment age of 30 for German firefighters did not infringe the Employment Framework Directive.
- An upper age limit of 68 for state-funded dentists in Germany was in principle justifiable.
- An upper age limit of 36 for entering training as an air-traffic controller was unlawful age discrimination.
- A compulsory retirement age of 48 for assistant referees in professional football was also unlawful age discrimination.

These cases need to be studied in detail to understand the underlying reasoning, but two general observations can be made. Firstly, it is possible to detect a more liberal approach to justifying age discrimination in the first two decisions, which come from the European Court of Justice, than in the remaining decisions, which were made by the employment tribunal. Secondly, all of the jobs involved were unusual. Little light has been shed on the correct approach to enforcing a compulsory retirement age in standard white-collar occupations.

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Conclusions

Over half the consultation document is taken up with an impact assessment, measuring the likely effect of the abolition of the retirement exemption on employers and the labour market. Drawing on a survey of over 2000 employers commissioned by the outgoing Labour Government, it estimates that around one third of all employers still operate a compulsory retirement age, though this rises to 46% in the public sector. It also draws on labour force surveys to show that although there has been some increase in the past 10 years, employment rates at the state retirement age are still relatively low, and fall rapidly in the following five years.

This evidence supports the Government's position that abolishing the default retirement age should be relatively manageable, looking at the labour market as a whole. But a sizeable minority of businesses may find it difficult to adapt. This is particularly so given the relatively short time employers are likely to be given to make the necessary changes, and the lack of guidance about whether a compulsory retirement age can be justified in standard occupations, and if so how.

What is clear is that evidence will almost always be required to link the chosen retirement age with the stated aims of adopting it. That is relatively easy when the age is chosen due to an age-related decline in physical performance. But it is less straightforward in other cases, because in non-physical jobs there is normally no clear correlation between increasing age and decline in performance. It is therefore likely to be safer to rely on aims like succession planning, rather than aims which rely on the assumption that performance tends to decline beyond a certain age.



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